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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **TYSON ROBINSON,** **Defendant and Appellant.**	**A120309** **(Marin County Super. Ct. Nos. SC144613, SC152496)**

In Marin County Superior Court Case No. 152496, appellant Tyson Robinson was tried before a jury and convicted of first degree burglary and conspiracy to commit first degree burglary. (Pen. Code, §§ 459, 182.)[1] The court found true an allegation that he had been previously convicted of a serious felony within the meaning of the five-year serious felony enhancement and the three strikes law. (§§ 667, subd. (a), 1170.12.) After revoking his probation in Marin County Superior Court Case No. SC144613, in which he had been convicted of selling cocaine base under Health and Safety Code section 11352, subdivision (a), the court imposed an aggregate prison sentence of 14 years four months: the middle term of four years for the burglary, doubled to eight years under the three strikes law, a five-year serious felony enhancement, plus 16 months (one-third the middle term of four years) for the drug charge in the earlier case. Sentence on the conspiracy count was stayed under section 654.

[1] Further statutory references are to the Penal Code unless otherwise noted.

Appellant argues: (1) the judgment in the burglary case must be reversed because the court abused its discretion in admitting evidence of a prior robbery under Evidence Code section 1101, subdivision (b) for the purpose of proving his intent during the burglary; (2) the evidence was insufficient to prove the "entry" element of burglary; (3) the evidence of conspiracy was insufficient because there was no substantial evidence appellant agreed ahead of time to commit the burglary; (4) the restitution fine originally imposed when appellant was placed on probation in the drug case was improperly increased by the court when he was sentenced to prison; (5) he was entitled to an additional day of custody credit; and (6) corrections/modifications must be made to the abstract of judgment. We affirm the convictions but agree that appellant is entitled to a reduction of the restitution fine and an additional day of custody credit, and that the abstract of judgment must be corrected in certain respects.

I. FACTS[2]

Gabriel Haskell lived on a houseboat in the Gate 6 Co-op (Gate 6) in Sausalito, a poorly maintained dock area with make-shift dwellings. The dock is unsteady, with trash, debris and raw sewage in the water, and it is an area unlikely to be frequented by persons not living there. Haskell is a musician and operated a recording studio in his houseboat. He had about $10,000 of recording equipment inside.

At about 10:00 p.m. on March 14, 2007, Haskell was home watching television and heard a creaking noise outside. He looked at a surveillance camera he had installed and saw two men approach the front door of his houseboat. Suddenly the door was kicked in and splintered open. The force used broke the deadbolt and one of the hinges and damaged the doorknob.

[2] Although the appeal is taken from a judgment imposing sentence in two separate cases, the only facts relevant to the issues on appeal are those relating to the burglary and conspiracy charges in Case No. SC 152496. We do not, therefore, discuss the facts underlying the conviction for sale of cocaine base in Case No. SC144613.

Haskell reacted by running and tackling a man who was in his doorway. The foam platform in front of his door cracked and they fell down, partially in the water. As they were struggling, another man approached with a gun pointed at Haskell and told him, "Don't die." The man was wearing a hooded jacket and had a bandana over the lower part of his face.

After hearing the threat, Haskell dove in the water (which was not very deep) and "halfway sw[a]m" to the dock five feet away. He ran down the dock, hearing an "explosion" behind him. The sky lit up like there had been a blast. Haskell continued to run until he had reached the parking lot of the Issaquah dock, which was the next dock over from the Gate 6. He saw some people in the parking lot, who called the police when he told them someone had shot at him. They noticed a person in the water swim under the Issequah dock, get out of the water and run away.

Mercedes Koestel lived on one of the other houseboats on the Gate 6. She heard a gunshot and looked out her window to see three silhouettes in front of Haskell's houseboat. The first person was running, the second one struggled on the dock before running after the first person and the third one jumped onto a float before realizing there was nowhere to go and ran off the float into the water. Koestel thought the first person was Haskell. The third person appeared to be wearing a sweatshirt with a hood covering most of his face.

Thomas Rogers and Alissandre Haas lived next door to Haskell at Gate 6 and also heard the gunshot. Rogers was in the bathroom, but Haas ran immediately outside and saw appellant running down the dock wearing a ski mask. Haas put up her arms and pushed appellant as hard as she could. Jarrard Walter, another resident of Gate 6, walked out of his houseboat and helped Haas push appellant. Walter and appellant struggled and fell into the water. Rogers came out of the house and struggled with appellant as he climbed out of the water, keeping him in place until the police arrived.

Marin County Sheriff's Deputy Boden arrived on the scene and found Rogers and appellant intertwined on the dock. He placed appellant under arrest and searched him,

finding no weapons. A ski mask was found in the water along with a black hooded jacket.[3]

Deputy Yazzolino contacted Haskell, who was soaking wet and very nervous. He searched Haskell for weapons but found nothing. A search of Haskell's houseboat uncovered some remnants of marijuana in the freezer section of the refrigerator. When Haskell returned to his houseboat, he discovered it had been ransacked and that some electronics equipment and computers had been destroyed.

Both appellant and Haskell were tested for gunshot residue. Residue was found on Haskell's hands, but not on appellant's. Haskell could have received the residue from firing a weapon, from having his hands in the vicinity when a weapon was fired, or from an environmental source. The negative finding on appellant's hands was inconclusive because firing a weapon does not always leave residue on a person's hands and because activities such as putting hands in one's pockets, washing one's hands and falling in the water can all remove residue.

The next day, a search of the area during low tide revealed footprints in the mud between the Gate 6 and Issaquah docks as well as muddy footprints along a route matching that taken by the second fleeing suspect. A black nylon hooded jacket was found in the water with a black skull cap or "do-rag" inside of it.

Questioned on cross-examination, Haskell denied that he sold marijuana. He admitted using marijuana and had a card issued by a physician for marijuana use. Haskell had been the victim of a strong-armed robbery on May 5, 2006, and when the perpetrator of that crime was apprehended while fleeing from police, he was carrying a backpack with individually packaged pieces of marijuana, hashish and 20 pieces of mail addressed to Haskell. On July 1, 2004, Haskell was stopped while riding as a passenger in his own car with a friend driving. Police discovered 19.3 grams of hashish and a pistol.

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[3] Haas was one of the persons who noticed the mask and helped pull it out of the water. When, at trial, she was shown the mask that was taken into evidence, she did not think it was the same one. Walter did not see a ski mask that night.

In 1994, appellant was convicted of bank robbery. On October 27, 1993, he and two other men wearing ski masks and dark clothing had entered the First Interstate Bank in Mill Valley at about 4:45 p.m. One stood guard at the door while the other two pointed their guns at the tellers, saying, "Give me your hundreds, bitch, or I am going to kill you." The men left after the tellers gave them what money they had. A search of appellant's residence later that day revealed a blue jacket with a hood and a black Raiders wool cap with two holes cut for the eyes.

II. DISCUSSION

A. *Evidence of the Prior Bank Robbery*

Over defense objection, the trial court allowed the prosecution to present evidence that appellant had participated in an armed bank robbery in 1993. The court concluded that the prior robbery, which involved the use of masks, a gun and accomplices, was sufficiently similar to the charged burglary to be probative of appellant's intent at the time of the charged offenses. Appellant argues that the evidence was irrelevant and in any event, was more prejudicial than probative under Evidence Code section 352. Although the issue of admissibility is close, we conclude that any error in admitting the evidence was harmless.

Subject to certain exceptions not relevant here, Evidence Code section 1101, subdivision (a) prohibits the admission of other-crimes evidence for the purpose of showing a defendant's bad character or criminal propensity. (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Evidence Code section 1101, subdivision (b) permits the use of other-crimes evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. . .) other than his or her disposition to commit such an act."

When evidence of another crime is admitted on the issue of intent, the other crime must be sufficiently similar to the charged offense to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) Even when relevant, such evidence must be excluded under Evidence

Code section 352 if its prejudicial effect outweighs its probative value and creates "a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Kipp,* at p. 371.) A trial court's rulings under Evidence Code sections 1101 and 352 are reviewed for abuse of discretion, a deferential standard that requires reversal only when a ruling " 'falls outside the bounds of reason.' " (*Kipp,* at p. 371.)

In this case, appellant was charged with first degree burglary and conspiracy to commit first degree burglary. The former crime required proof that he or his accomplice entered the houseboat with a specific intent to commit theft or a felony. The conspiracy count required a specific intent to commit a burglary as defined in the burglary statute. While the bank robbery was by no means identical to the charged offenses (it occurred during the day, in a commercial establishment) it was similar to the extent it was committed by appellant and at least one more person, that someone in the group was armed with a gun, and that masks or some other facial covering was used. The jury could reasonably infer that when he and a companion broke down the victim's door while armed with a gun and wearing clothing that concealed their identity, appellant acted with the same intent to steal that he had harbored during the prior bank robbery.

That said, the probative value of the prior robbery was not particularly strong. "[I]n most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 406.) Here, the victim's testimony established that two men, at least one of whom was armed, kicked in his door one night and fled after a struggle. Although the defense argued that a completed entry had not been proved, and that the evidence was insufficient to establish the houseboat was an occupied dwelling for purposes of first degree burglary, the criminal intent of whoever kicked in the door seems relatively clear under the circumstances. "[I]f it is beyond dispute that the alleged crime occurred, [other-crimes] evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (*Ibid*.)

Assuming the court should have excluded evidence of the prior robbery under Evidence Code section 352, any such error was harmless since it is not reasonably probable appellant would have obtained a more favorable result absent this evidence. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "The prejudicial effect inherent in evidence of prior offenses varies with the circumstances of each case. Factors that affect the potential for prejudice include the degree to which the prior offense is similar to the charged offense, how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense. [Citation.]" (*People v. Wade* (1996) 48 Cal.App.4th 460, 469 [discussing prejudicial effect of evidence concerning the nature of a prior conviction that is an element of the charged offense].) " ' "Improper evidence of [a] prior offense results in reversal only where the appellate court's review of the trial record reveals a closely balanced state of the evidence. [Citations.]" '[Citation.]" (*In re James B.* (2003) 109 Cal.App.4th 862, 875.)

These factors militate against a showing of prejudice in this case. The evidence of appellant's guilt was very strong rather than "closely balanced." (*In re James B.*, *supra*, 109 Cal.App.4th at p. 875.) The victim testified that two men came to his houseboat at night and kicked in his door, after which a struggle ensued and at least one shot was fired. This testimony was corroborated by the testimony of neighbors who saw and heard portions of the struggle. Appellant was apprehended by neighbors as he ran down the dock, and he was arrested at the scene. Officers verified that the victim's door appeared to have been kicked in. Other than some impeachment evidence suggesting the victim may have been untruthful when he denied ever selling marijuana, the defense presented no evidence that might supply a reason for appellant's presence on the dock other than his participation in the burglary.

Against this backdrop, the evidence of the prior bank robbery was unlikely to have affected the verdict. It was not so similar to the charged burglary that the jury would have concluded that a person who committed the bank robbery was particularly likely to have burglarized the houseboat. It was not recent, having been committed 13 years

earlier. Nor were the facts of the bank robbery inflammatory compared with the charged burglary—although a gun was used and bank tellers were threatened, shots were never fired and no one was hurt. Finally, the court limited the prejudicial effect of the bank robbery evidence by instructing the jury that it was admitted solely to prove intent and could not be considered as proof of appellant's bad character or propensity to commit the charged offenses. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) Reversal is not required.

B. *Sufficient Evidence of Entry*

A person commits burglary when he or she "enters any house, room, apartment. . . or other building. . . with intent to commit grand or petit larceny or any felony. . . ." (§ 459.) Appellant argues that his conviction for burglary must be reversed because the evidence was insufficient to establish a completed entry into the houseboat. We disagree.

In considering a criminal defendant's claim of insufficient evidence, we review the entire record to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576; *People v. Earp* (1999) 20 Cal.4th 826, 887-888.) We must presume in support of the judgment every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Johnson*, at p. 576.) It is the jury, not the appellate court, that must be convinced of the defendant's guilt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

In *People v. Valencia* (2002) 28 Cal.4th 1, 12 (*Valencia*), our Supreme Court affirmed that any kind of entry past the exterior of the premises, "complete or partial," will suffice under the burglary statutes. There, the court held that penetration of the area behind a window screen is enough, even when the window itself is closed and is not penetrated. (*Id*. at pp. 12-13.) "Entry that is just barely inside the premises, even if the area penetrated is small, is sufficient." (*Id*. at p. 15.)

In this case, the victim testified that the intruders kicked in the front door to his houseboat and that when he examined it later, he saw it had been kicked off the hinges with the area around the doorknob splintered open. Deputy Yazzolino examined the door later that night and found the hinges and deadbolt broken. Another investigating officer, Deputy Blasi, confirmed that the lock on the door was no longer functional when he examined it and that it appeared a forced entry had been made. Blasi had received emergency response training that included techniques for breaching or entering a dwelling and had made over 20 forced entries through doorways, commonly using his feet. He had never been able to breach a doorway without breaking the plane of the doorway because due to the body weight and momentum behind a kick, "once the resistance gives way from the door, you unintentionally fall forward."

From the foregoing evidence, a rational jury could reasonably determine that the intruder who kicked in the victim's door crossed the threshold with his foot. Moreover, one Court of Appeal recently held that kicking in the door of a home is itself sufficient to constitute a burglary, because the door itself becomes an instrument used to penetrate the building. (*People v. Calderon* (2007) 158 Cal.App.4th 137, 144-145.) The evidence was sufficient to support the entry element of burglary.[4]

C. *Sufficient Evidence of Conspiracy*

Appellant contends his conspiracy conviction must be reversed because the evidence was insufficient to show that he and his cohort agreed in advance to commit the burglary. We disagree.

A criminal conspiracy exists when there is an unlawful agreement to commit a crime between two or more people and an overt act in furtherance of the agreement. (See §§ 182, subd. (a)(1), 184.) Evidence of a conspiracy is sufficient if it "supports an inference that the parties positively or tacitly came to a mutual understanding to commit a

[4] The jurors were instructed on attempted burglary as an included offense, and could have returned a verdict on this lesser charged if they had harbored a reasonable doubt that appellant or his cohort entered the houseboat.

crime." (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) A conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 311.)

The evidence showed that appellant and another man approached the victim's house boat late at night and kicked in his door with the intent to steal something. Though there was no evidence of a formal meeting ahead of time, the two arrived together at the door of the houseboat, a location where nonresidents and passersby were unlikely to be by mere chance. At least one man was armed with a gun, suggesting a plan to use some kind of force, and there was evidence they were wearing facial covering. Appellant and/or his cohort kicked in the door in what appeared to be an orchestrated attempt to gain entry into the houseboat. From these circumstances, the jury could infer that they had agreed to their course of action before the burglary was actually committed.

Appellant complains that it is a rare case in which conspiracy is charged in addition to a completed felony such as burglary. This may be true, but it does not render the evidence insufficient as a matter of law. Appellant urges us to discourage the prosecution from the practice of routinely charging conspiracy in a "run-of the-mill" burglary case. (See *People v. Bartlett* (1957) 153 Cal.App.2d 574, 579.) The charging process is a matter committed to the district attorney's discretion and there was no abuse of that discretion here. (See *People v. Municipal Court* (1972) 27 Cal.App.3d 193, 204.)

D. *Restitution Fine*

Appellant was initially granted probation in Case No. SC144613 for his conviction of selling cocaine base under Health and Safety Code section 11352, subdivision (a). At that time, the court imposed a $300 restitution fine under section 1202.4. When probation was revoked and appellant was sentenced to prison in that case along with the sentence imposed in Case No. SC152496 (the houseboat burglary), the court increased the $300 fine to $1,000 and imposed a $1,000 parole revocation fine under section 1202.45. The $1,000 fines in Case No. SC144613 were ordered to run

"concurrent" with a $3,400 restitution fine and a $3,400 parole revocation fine imposed in Case No. SC152496. From its comments, it appears the court believed the earlier fine imposed in Case No. SC144613 was $1,000, not $300.[5]

Appellant correctly observes that the court was without authority to impose an additional fine in Case No. SC144613 upon the revocation of probation. (*People v. Johnson* (2003) 114 Cal.App.4th 284, 306-307; *People v. Chambers* (1998) 65 Cal.App.4th 819, 820-821.) The People suggest the court was entitled to modify the amount of restitution ordered as a condition of probation from $300 to $1,000, but they cite no authority for this proposition. The court was not, in any event, reinstating probation or the attendant conditions. The fine must be reduced to the original amount of $300, as must the accompanying parole revocation fine. (*Ibid.*; see also *People v. Andrade* (2002) 100 Cal.App.4th 351, 357-358.)

E. *Credits and Modification of Abstract of Judgment*

Appellant argues, and the People agree, that he is entitled to 260 days of actual custody credit rather than the 259 days awarded at sentencing. We will order the judgment modified accordingly, at which time the abstract of judgment also should be

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[5] After imposing the $3,400 fine in Case No. SC152496, the court stated, "In connection with that last case, SC144613A, restitution fine in the amount of $1,000 pursuant to 1202.4, has that been paid?" When the probation officer indicated no restitution had been made, the court stated, "I'll make that concurrent with the $3,400 in the other case. There's an additional $1,000 restitution—parole revocation restitution fine pursuant to 1202.45. I'll make that concurrent with the $3,400 as well in the other case." Appellant does not challenge the $3,400 fines ordered in Case No. SC152496.

A restitution fine is mandatory absent "compelling and extraordinary reason." (§ 1202.4, subd. (c); *People v. Wilen* (2008) 165 Cal.App.4th 270, 283.) There is no authority allowing a sentencing court to run one such mandatory fine "concurrently" with another in the same manner as a concurrent sentence (i.e.; so that the payment of one is also credited toward the payment of the other) as this would have the effect of allowing the defendant to avoid payment of the lesser fine. We construe the trial court's characterization of the restitution fine as "concurrent" in a more colloquial sense—that the second fine would be paid along with the first.

corrected to reflect a 16-month consecutive term for the violation of Health and Safety Code section 11352, subdivision (a) in Case No. SC144613, rather than the 16-year term mistakenly reflected on the current abstract.

III. DISPOSITION

In Case No. SC144613, the $1000 fines imposed under sections 1202.4 and 1202.45 are modified to $300 each. The judgment is further modified to award appellant one additional day of actual custody presentence credit, resulting in an award of 260 days actual time and 39 days of conduct credit, for a total of 299 days of presentence credit. The abstract of judgment shall be modified to reflect these changes and shall additionally be corrected to reflect a sentence of 16 months in Case No. SC144613 rather than a sentence of 16 years.

As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

STEVENS, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.